CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1810—FIRST DISTRICT.

☞ *At the opening of the Court, a commission was read, dated the 21st of March* 1810, *by which* FRANÇOIS-XAVIER MARTIN, *(then a Judge of the Mississippi Territory) was appointed one of the Judges of this Territory in the room of Judge Thompson, deceased.*

PARISH vs. *SYNDICS OF PHILLIPS. ante* 64.

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Brown for the plaintiff. The dissolution of the partnership by Woolsey cannot be said to be fraudulent, for it left the creditors in as safe a situation as they were during the continuation of the partnership.

A party to a contract cannot render the situation of the other harder or more difficult.

THE mortgages taken by Woolsey, notwithstanding the insolvency of Phillips, cannot be said to be in fraud of the creditors of the firm, for the premises were equally liable to their claims, after, as before, the execution of the mortgages—the mortgagor and mortgagee being both bound for the payment of them.

NEITHER can the assignment to Parish be

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said to be fraudulent, while it is not even suggested that Woolsey is insolvent. Every man is presumed solvent until the contrary appears. Woolsey's solvency could easily be established, if it were required. If it be admitted, their is not a shadow of doubt as to the fairness of the transaction between Woolsey and Parish. For, a solvent man may dispose of his property at pleasure.

If the assignment be not fraudulent, it is immaterial to shew the authority of the agent. Parish has adopted his act; his acceptance of the mortgages has a retrospective effect. The ratification of the principle cures all the defects that may have existed as to the nature of the agent's powers.

By the Court, LEWIS, *J. alone.** However solvent Woolsey may be, he cannot by his own act deprive the creditors of the firm of their right to have their debts paid out of the estate of Phillips in this country. A party to a contract cannot render the situation of the other harder and more difficult. It is a fraud to the creditors to remove from their reach the property which they have a right to consider as the pledge of their claims. Woolsey may be solvent, but his solvency cannot anthorise him to take from them their lien on the property of Phillips. It is much

MARTIN, J. declined giving an opinion, as the case had been argued before he took his seat.

MATHEWS, J. did not sit during this term.

more advantageous for them to have their debt paid out of the property of their debtor here, than to be compelled to look for Woolsey out of the territory.

JUDGMENT FOR THE DEFENDANTS.

MOREAU vs. *DUNCAN.*

Whether plaintiff's attorney be liable to pay the tax on the suit? Quere.

THE plaintiff, who is Judge of a Parish Court, claimed the sum of one hundred dollars, for the tax, laid by the act of this territory, 1809, *c.* 7, stating that the defendant, as attorney to several persons, had lately brought one hundred suits in the plaintiff's court.

THE act provides that "the attorney's fee, "in each case shall be eleven dollars, to be taxed . . . . . by the Parish Judges respectively, and paid by the party cast." It afterwards imposes "a tax of one dollar" on all suits "prosecuted in the Parish Courts . . . . "to be deducted out of the said attorney's fee "in each cause," and makes it the duty of the Judge to collect and account for the tax.

LEWIS, *J.* The plaintiff ought to recover, for he is liable for the tax. He ought to receive it at the time the process issues. It would be inconvenient and unsafe to wait till the determination of the suit to exact it from the party cast, who might not be able to pay it.

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THE defendant having obtained the process on the issuing of which the tax was demandable, ought then to have paid the tax, and if the plaintiff has indulged him, a suit may now be maintained.

MARTIN, *J.* It certainly would have been the best way to render this imposition productive, and the collection of it easy, to have required the payment of the tax, at the *inception* of the suit. But the Legislature having provided, at the time they imposed the tax, that it should be *deducted* out of a certain fee, to be taxed by the Judge and paid by the party cast, has certainly postponed the collection of it to the *conclusion* of the suit.

THE tax being expressly required to be paid out of the fee taxed for the attorney of the successful party, it appears to me the fisc cannot expect any tax in cases in which no attorney's fee is taxed, or where the successful party has appeared in *propriâ personâ*, in cases in which the object of dispute is less than $100, or in cases in which the party cast, is not able to pay.

I CONSIDER this as an imposition, on attorney's taxed fees paid by the party cast, which is not to be *advanced* or *insured* by the person who brings the suit, nor his attorney.

THE TERRITORY vs. *THIERRY*.

FALL, 1810.
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Written interrogatories not necessary in all cases of contempt.

THIS was an attachment for a contempt of this Court, by a libellous publication subscribed with the defendant's name, and printed in the *Courrier de la Louisiane*, of which he was one of the editors. It was grossly and indecently abusive, and appeared to have been written for the purpose of making an improper impression on the public mind, in favor of a person against whom the Grand Jury had just found an indictment for a libel.

THE paper being produced in Court, and proof made that the defendant was editor and printer of it, the Court,* MARTIN, *J. alone*, directed the attachment to issue in the first instance.

ON the defendant being brought in, the paper was shewn to him, and he acknowledged he was the editor of it and the writer of the piece: whereupon the Court informed him no advantage would be taken of his admission, but he must give bail for his appearance on a future day, to answer interrogatories.

HE replied he needed no time.

THE Court then advised him to speak to an attorney.

HE answered he had no occasion for counsel, and on his repeating he wanted no delay:

HE was sworn, and the paper being again

* LEWIS, J. being personally alluded to in the piece, refused to take any part in this case.

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shewn him, he repeated his former acknowledgment.

THE Court directed it to be recorded, and having heard him in his defence, gave judgment that he pay a fine of fifty dollars, and be imprisoned during ten days.

ON the next day, *Duncan* for the defendant, moved that the proceedings against him from the time of his appearance in court, be set aside, and that he might be admitted to give bail to answer interrogatories. He said that no judgment could be given, nor could any defendant be compelled to answer in any case, except that of a contempt committed in the face of the court, until a *written* charge or accusation was filed against him.

By the Court. When the contempt is of such a nature, that when the fact is once acknowledged, the court cannot receive any further information by interrogatories than it is already possessed of, the defendant may be admitted to make such simple acknowledgment, without answering interrogatories. 4 *Black.* 287.

ON the tenth day the court directed the sheriff to discharge him, reckoning the fraction of the day of commitment as a whole day.

TERRITORY vs. *NUGENT*.

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Security for good behavior may be required of a libeller.

PROCESS of attachment having issued against the defendant for a contempt of court by a libelous publication; he was brought in and gave bail to answer interrogatories.

CIRCUMSTANCES of aggravation attending this case, the Court* required him to give security for his good behaviour during six months: and he gave it accordingly.

AFTERWARDS, *Holmes*, moved that he might be released from his bond and cited the case of the *King* vs. *Wilkes*, 2 *Wilson* 159, in which Lord C. J. Cambden says: "We are all of opinion "that a libel is not a breach of the peace: it tends "to a breach of the peace and that is the utmost. "I cannot find that a libeller is bound to find "surety of the peace in any book whatever, nor "ever was in any case, except that of the seven "Bishops, where three judges said that surety of "the peace is required in case of a libel. Judge "Powell, the only honest man of the four judges, "dissented, and I am bold to be of his opinion, "and to say that case is not law, but it shews the "miserable condition of the state at that time. "Upon the whole, it is absurd to require surety "of the peace or bail in the case of a libeller."

By the Court. I cannot even, upon the high

* THE same considerations as in the preceeding case, had induced LEWIS, J. to leave the bench.

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authority which is offered, admit the proposition that it is absurd to require bail from a libeller. To publish a libel is an indictable offence, and I do not see how the prosecution is to be carried on, if the person of the offender be not at first secured, and how after arrest, he may be discharged, except upon bail.

WITH regard to surety of the peace, if it be not to be required of a libeller, it is because the publication of a libel is said not to be a breach of the peace—and therefore requiring that surety would not have the effect of preventing a reiteration of the offence, as such a reiteration would not be a breach of the peace, and consequently would not occasion the forfeiture of the recognizance. In this sense, I understand Lord Chief Justice Cambden. The defendant in the case cited, Mr. Wilkes, was a member of parliament, and was charged with the publication of a libel. He contended and, I admit, with propriety, that his situation protected him from an arrest, in all cases except treason, felony and a breach of the peace, and the offence with which he stood charged was not treason, felony nor a breach of the peace: but I am not to conclude that if he had not been a member of parliament surety for his good behavior could not have been required of him.

ALL the elementary writers agree that surety for the good behaviour may be required of the

persons charged with the offence sworn to have been committed by the present defendant.

ONE may be bound to his good behaviour..... for words tending to scandalise the government, or in abuse of the officers of justice, especially in the execution of their office. 4 *Blackst.* 253. For speaking words of contempt of an inferior magistrate, as a justice of the peace and a mayor, though he be not then in the actual execution of his office; and of an inferior officer of justice, as a constable, and such like being in the execution of his office. 1 *Hawk.* 132.

IN the 18th year of Edward 3d, one John de Northampton acknowledged himself the writer of a letter, deemed by the court to be a libel against John Fenners, one of the king's council, and *committitur marescallo, et postea invenit* 6 *manucaptores pro bono gestu.* 3 *Co. Inst. c.* 76, 174.

THE common law has provided a proper method for the punishment of scandalous words, [spoken of magistrates,] viz. binding to the good behaviour: by *Holt, C. J.* in *Regina* vs. *Rogers.* 2 *Ld. Raymond* 778.

LANGLEY was indicted for speaking these words to the mayor of Salisbury, "you are a rogue and a rascal," and by Holt, C. J. the mayor had done well if he had bound the defendant over to his good behaviour. *Id.* 1029. 2 *Salk.* 697.

A MAGISTRATE may bind to good behaviour a person who abuses him. 1. *Cro.* 78.

THE practice of requiring surety for the good

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behaviour from libellers prevails in the United States. Chief Justice M'Kean of Pennsylvania demanded it from Cobbett. 1 *Am. law journ.* 287. In the case of the *Commonwealth* vs. *Duane*, *id.* 168. Chief Justice Tilghman said: "I "will not say that there are not circumstances in "which surety for the good behaviour might be "exacted in cases of libels, before conviction; "on the contrary, I have no doubt, but there are "occasions, on which it may be proper and neces- "sary to insist on it." It is true the Chief Justice declared his opinion that as a general rule, it would be better not to require it. But the defendant has for a long time persisted in the practice, and it is time to put a stop to it. It is better to prevent, than to punish crimes.

IT is also proper to be observed that the case on which the defendant relies is generally believed not to have been very accurately reported. Ridgeway in his edition of *Cases tempore Hardwicke* mentions it among the cases doubted or denied to be law, and *p.* 102 *in notis* informs us that Lord Chief Baron Yelverton, in a case tried before him, *Griffin* vs. *Carleton*, mentioned the principle contended for as depending on a loose saying of Lord Cambden in Wilkes's case, and stated his apprehension that the report of it is not correct. The editor also mentions the cases of the *King* vs. *Rowan*, and the *King* vs. *Drennan* as recent instances of a contrary practice in Ireland.

MOTION OVERRULED.

A FEW days after the defendant appeared to answer interrogatories, and admitting that he was the writer of the libel, averred on oath he had not, in publishing it, any intention of offering any contempt to the court, or any of its members.

WHEREUPON *Holmes* and *Davezac* contended he must be discharged: for any act in order to be punishable must be criminal, and nothing can be said to be criminal that is not done *malo animo*, and the defendant's answer must be taken together: no part of it can be rejected.

By the Court. Where the writing is so clear as to amount of itself to a libel, all foreign circumstances introduced upon the record are unnecessary, *Rex* vs. *Home*. *Cowper* 683. The publication being confessed, the court has only to pronounce whether it amounts to a contempt or not. The intention, giving it the utmost latitude, can be taken only in mitigation. It cannot make the publication less a contempt—a man may not justify his conduct by saying, I have offended, but did not mean to sin. Denying any disrespectful intention is no justification, if the words published be, in the opinion of the court, contemptuous. *The People* vs. *Frier*. *Cains*, 485.

WHEN I consider this part of the defendant's answer, with a view to determine whether it will

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bear me out in lessening his punishment, I am amazed. What am I to think of the conscience of a man, who calls his God to witness that he had no intention of treating one of the members of this court with disrepect, when he published these words to the world, "I have ever believ. "ed him (the Judge) capable of all that is base "and villainous"? What credit can I give to such testimony? It is my duty to inflict the highest punishment which the act of the Legisla. ture authorises.

HE was accordingly fined fifty dollars, and committed for ten days.

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Notwithstanding the affidavit be sufficiently strong, no continuance will be granted if suspicious circumstances are not accounted for.

By the Court, MARTIN, *J. alone.** The defendant has been indicted and found guilty of the publication of a malicious libel, and has moved for a new trial on the following grounds:

1. BECAUSE a continuance was denied him, although an affidavit sufficiently strong to entitle him to it, was made.

BECAUSE the court rejected proper, and admitted improper testimony.

I. THE affidavit stated in the usual form, the materiality of the testimony of Cadet Bayon, and others—the defendant's diligence to obtain their attendance—their absence, and the probable ex-

* LEWIS, J. had quitted the bench. See note p. 101.

pectation of their presence at a future term—denying collusion, &c. 2. His ill state of health which disabled him from undergoing the fatigue of a *public examination*. 3. The absence of another material witness whom he had not been able to subpœna in time.

IT must be admitted that this affidavit was sufficiently strong, and the court ought to, and would certainly have granted the continuance of the cause on it, if such suspicious circumstances had not existed and been presented to the court, as must have created a belief that the affidavit was made with a view to obtain a delay which could not have been of any advantage to the defendant, except in protracting the trial, and affording him the opportunity of working on the public mind by his publications.

THE defendant, in an affidavit which he had caused to be printed, at the foot of a very gross libel, (evidently circulated in town to induce a belief that he was prosecuted and hunted down as a martyr to the liberty of the press, and that the court would act corruptly on his trial) had stated that Cadet Bayon and the other witnesses named in the affidavit, would prove most of the facts charged in the libel, for the publication of which he was indicted. Hence the court could not but strongly suspect, as the defendant had expressed in several of his publications, his opinion that the court would not admit evidence of the truth of the facts charged in the libel, that

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he had made the affidavit with the consciousness that the witnesses to the materiality of which he had sworn, were inadmissible, and that therefore their absence from the trial could not be injurious to his cause.

As the court must have received an impression, from this circumstance, that the defendant allowed himself great latitude in his affidavit, it was thought a duty to the territory to require that he would state in a supplemental affidavit what fact was intended to be proven by the absent witness—His refusal to do so was calculated to induce the court to believe that no injury would be done to the defendant in ruling him to trial, notwithstanding the absence of this witness.

THE two first reasons for a new trial, having appeared to the court frivolous and groundless, it was not easy to approach the last without some degree of caution. The presence of the defendant in court, in apparent high health, the attendance of several gentlemen as his counsel, confirmed the court in the belief (which had been created by the consideration of the two first parts of the affidavit) that delay only was the defendant's object. His subsequent active conduct, in the course of the trial, precludes the possibility of thinking, he suffered any injury on that score.

ON this part of the case, it does not appear

that the court erred in denying the continuance on the affidavit produced.

II. A NEW trial is also asked, because the court rejected proper, and admitted improper evidence.

PROPER evidence is said to have been rejected, in as much as witnesses were not admitted to prove the truth of the facts contained in the libel.

The truth of a libel not admissible evidence.

IN criminal prosecutions, in the courts of this territory, the rules of evidence are, by an act of the Legislature, declared to be those of the common law of England. 1805, *c.* 50, § 33.

THE truth of a libel is not admissible evidence: neither is the bad reputation of the person libelled. 2 *M'Nally's Ev.* 649. *Hawk. P. C. ca.* 73. 3 *Bac.* 495.

IT is immaterial with respect to the essence of the libel, whether the matter be true or false, since the provocation, and not the falsity, is the thing to be punished. 4 *Blackst.* 150. *Wood's Inst.* 424. For in a settled state of government, the party grieved ought to complain for every injury done to him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise. The case *de libellis famosis.* 5 *Co.* 125. *b.*

A LIBEL, though the contents be true, is not to be justified. *Hob.* 253. It is punishable tho' the matter be true. *Moor.* 627. It is a libel, though it be true, for it tends to private quarrels and revenge. 4 *Com.* 150.

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A MAN may justify in an action for words or a libel, otherwise in an indictment. *per Holt, C. J.* 3 *Salk.* 326, 11 *Mo.* 99.

AND yet, although the law allows the party to justify in an action for words *spoken*, it does not for *written* scandal. 3 *Bac.* 495.

AFTER so many concurring authorities from the English elementary writers and reporters, it must be concluded that according to the rules of the common law, the court could not have allowed the defendant in this case to have introduced witnesses to prove the truth of the facts charged in the libel. But it is contended that the people of this country have a constitutional right to the liberty of the press, and this principle of the common law, being irreconcileable with this right, is not binding on the court, although recognized by the act of the Legislature.

CONSTITUTIONAL, as well as all other rights, are to be exercised, so as they work no injury to others. *Sic utere tuo ne aliis lædas.* Our fellow-citizens in the states of Connecticut, New-York and Virginia, are in as full possession of this right as we. Yet their jurists recognize the common law principle complained of, in its full extent. In 2 *Swift's System*, *p.* 346, the distinction between the right of giving the truth in evidence in criminal prosecutions, and in actions for defamation, is laid down as the law of Connecticut, although the author informs us there

has been no *express* recognition of it. The Supreme Court of the State of New-York admitted the principle in the case of *the people* vs. *Croswell*, and Judge Tucker, in a work avowedly written with the view of pointing out the discrepances of the laws of Virginia from the common law, although he warns the student of the necessity of considering the reasonableness of the doctrine established in 5 *Co.* 125, does not hint at any modification of it, peculiar to the American States. 4 *Tucker's Bl.* 150.

IN Pennsylvania, the principle was abrogated in 1809, by an act of the Legislature. *Binney* 601—in North Carolina in 1802, *c.* 8, *p.* 215, and this is negative evidence that it was inforced in those States before those periods.

IF any doubt remained, the absence of any case, in which it was overruled in England, or such of the United States, in which no legal provision exists, would be conclusive, especially when it is considered that the French and Spanish laws, which were heretofore in force here, are conformable in this respect to the common law of England.

Mais quelque vraie que soit l'injure, lorsqu'elle est faite ailleurs qu'en justice, dans le dessein d'injurier, elle est punissable, quand même elle ferait connaître un crime dont il conviendrait de tirer vengeance pour l'intérêt public. 31 Repert. Un. et Rais. de Jurisp. *Verbo Injure p.* 318.

Celui qui a écrit ou lu un libelle . . . . ne sera

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pas reçu a demander a faire preuve des faits contenus dans le libelle. Salviat, Jurisp. Parl. Bord 350.

Ca maguer quiera probar aquel que fizo la cantiga, o rima, o dictado malo, que es verdad aquel mal o denuesto que dixo de aquel contra quien lo fizo, non deue ser oydo, nin le deuen cabar la prueba. 7 *Part. tit.* 9. *ley* 3.

FROM all these authorities, it appears to me safe to conclude that in refusing to allow witnesses to be examined as to the truth of the facts charged in the libel, the court did not reject proper evidence.

IT is next complained that improper evidence has been admitted. The fact is that a witness introduced by the Attorney General, being asked whether he knew who was the author of the libel in the indictment, answered he could not answer this question with safety. The Attorney General then asked him whether it was not within his knowledge whether the defendant was the author of it, he hesitated, and an appeal was made to the court whether the question was proper, the witness contending he might criminate himself by answering it. On the part of the defendant, the case of Willie, one of the witnesses on the trial of Burr, was read, in which Chief Justice Marshal said, that a witness is the sole judge whether he will, or will not, be committed by answering a question put to him—but it appears that the Chief Justice in this very instance compelled

the witness to answer. 1 *Burr's, trial, p.* 245. In examining the abstract proposition attributed to the Chief Justice, it seems an immense latitude is left to the witness, if when a question is put to him, the answer to which cannot implicate him, he may skreen the defendant, by refusing to answer, alledging that he may not do so without danger—an allegation to which common sense may give the lie, and in which he cannot be contradicted. The witness answered he knew the defendant was the author of the libel—he had acknowledged it to him. In reviewing anew the decision of the court, it does not appear how this answer could have criminated the witness, and the conclusion follows that, in this respect, no improper testimony was permitted to go to the jury.

NEW TRIAL REFUSED.

THE defendant's counsel now moved in arrest of judgment that it did not appear by the indictment that the offence was committed within the jurisdiction of the court. The district was mentioned in the margin, and the offence was stated to have been committed in the city of New-Orleans, without adding the words *in the district aforesaid*, nor was the district referred to in any other manner.

THEY said that the true venue, by the laws of the territory, is the district. *The city of New-Orleans* is not of itself a sufficient description of the place. The Grand Jury must be of

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the proper district and vicinage. They commented on the excellence of the trial by Jury and the necessity of a strict adherence to rigid rules in criminal cases. It must appear on the face of the indictment that the court and jury have jurisdiction 2 *Hawk.* 303, and, as to the necessity of the inserting the venue, they cited 2 *Hale* 180.

The Attorney General (Grymes) in reply cited 3 *Bacon* 220, where it is stated that when the county is in the margin, it will be implied that the town in the indictment is within it: but he relied mostly on the 33d section of the act of 1805, *c.* 5. which provides "that the forms of indictments (divested however of unnecessary prolixity).....changing what ought to be changed, shall, except as by this act is provided, be according to the said common law."

By the Court. I believe the authorities cited by the defendant's counsel from Hawkins and Hale are conclusive. There are a number of others. The Court held so in the case of *Rex* vs. *Burridge*, 3 *P. W.* 496, and relied on the cases of *Parker* vs. *Ladd*, 1 *Sidney* 345 and *Rex* vs. *Fossett*, 12 *W.* 3. *Easter Term. B. R.* I have known the same principle determined in the Superior Court of North Carolina in the case of the *State* vs. *Adams*, for murder, at Newbern in March term 1793, *Martin's notes*, 30; so that there can be but little doubt, unless the act of the Legislature of the territory has altered the common law in this respect.

INDICTMENTS by this act must be as at common law, but divested of unnecessary prolixity. But the defendant contends that in the present case there is a total omission of a material circumstance, not that it is too succintly detailed. In the case in North Carolina, an argument was attempted to be drawn, in order to excuse the omission, from the niceties spoken of by Blackstone as condemned by Hale, but Williams, J. observed these were niceties of another kind. After all, it deserves great consideration, before the court should determine that they will consider as unnecessary any circumstance, which the judges who have preceded them, have held *essential* to the sufficiency of the indictment: whether the judgments of the individuals or individual who fills the bench, is to be the sole rule of decision, in criminal cases. I cannot alone, unaided and unchecked by any of my brothers, take on myself to go so far.

CURIA ADVISARE VULT. *Post* 169.

WEEKS vs. *TRASK.*

If the affidavit does not clearly shew that a specific sum is due, bail cannot be demanded.

THE defendant had been held to bail on the plaintiff's affidavit that the account annexed to the petition was just and true, and that no part of it was paid, *except as far as the defendant might have an account against him for goods furnished;* a motion was now made for his discharge, on account of the insufficiency of the affidavit.

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Ellery in support of the motion. There are three acts of the Legislature of this territory, on the subject of bail, and the plaintiff does not appear to have complied with the requisites of any of them. The affidavit was doubtless grounded on the act of 1808 *c.* 16. The 10th section of it provides "that in all actions where the amount "of the sum due is above one hundred dollars, "whether upon bond, bill of exchange, promis- "sory note, liquidated account, and in every case, "where the amount of the debt is ascertained "and specified, the plaintiff, on making affidavit "of the amount really due of any debt or de- "mand," shall be entitled to require bail. In the present case, the plaintiff has not sworn that any specific sum is due to him; he admits he has received goods in payment, but does not say to what amount. Indeed, for aught that appears in the affidavit, the defendant's account for goods, may be larger than that of the plaintiff.

Hennen, contra. The plaintiff has sworn that the account annexed to the petition, is just and true, and that the defendant owes him the amount of it: it is true he has added that the defendant has an account for goods against him. When there are accounts between two persons, each of them may safely swear that the amount of his own account is due to him. The law does not require an actual settlement of accounts, which neither party can effect without the consent of the other; nor should a man be bound

to give credit for the amount of an account of which he has no accurate knowledge: all that is required of him is, that he should swear to the amount of his own demand.

Ellery, in reply. The relative situation of the parties in this case, appears from the petition and the plaintiff's account. It seems he was the defendant's overseer. From this circumstance it will be presumed that the goods with which he admits the defendant supplied him, were furnished to him in part payment of his wages. They therefore must lessen, and perhaps will balance, or surpass his claim.

By the Court, MARTIN, *J. alone.* This action appears to have been brought for work and labour done by the plaintiff, as overseer of the defendant. The affidavit admits that the defendant supplied the plaintiff with goods, the amount of which was to be deducted out of his wages, and the plaintiff qualifies his affidavit by swearing that the amount of the account is due, *except, &c.* The claim must therefore be considered as unliquidated, since it is sworn that the whole of it is not due. Certainly, if the whole be not due, the defendant cannot be compelled to give bail for the gross sum, and the affidavit furnishes no *datum*, according to which it may be reduced. Indeed, for any thing that is sworn to, it does not clearly appear that the balance will be found against the defendant.

BAIL DISCHARGED.

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BLANC & AL. vs. *THE MAYOR, &c. OF NEW-ORLEANS.*

Whether the Corporation of N.-Orleans may lay a toll on boats, at the bayou bridge?

By the Court, MARTIN, *J. alone.* The complainants state, that they are owners of vessels navigating the Bayou St. John—that in pursuance of an ordinance of the City Council of New-Orleans, sanctioned by the Mayor, the officers of the corporation are preparing to collect a tax which will materially affect their respective interests, and suggesting that the City Council has exceeded its powers, pray the court to declare the ordinance null and void, and in the mean while, to inhibit the Mayor and City Council, and their officers, agents or farmers, from collecting the tax until the matter in the bill shall be fully pronounced upon.

THE facts in the case are these:

BEFORE the year 1797, there had existed a dormant bridge across the Bayou St. John. At that time the Canal Carondelet being perfected, the Cabildo of the City of New-Orleans spent in building a draw-bridge, a sum of money, part of a larger one appropriated to another use. With a view to replace the money thus diverted and to provide a fund to furnish to the repairs of the bridge, that body laid a tax of one dollar upon every schooner entering the bayou.

IN the year 1808, the bridge being much damaged, the Legislature of the Territory authorised the Corporation of the city of New-Orleans to receive this dollar tax or toll, which was

extended to every embarkation except pirogues and fishermen's boats; making it the duty of the Corporation to rebuild the bridge, in the same manner and dimensions and to keep it in repair. In the following year, so much of this act as related to the manner of building and the dimensions of the bridge, was repealed.

IN pursuance of these two acts, the corporation built a new draw-bridge, and on their attempting to collect the dollar toll, an injunction was obtained by the Orleans Navigation Company, which has since been made perpetual. The court expressing an opinion that "the charge "was onerous and without public utility, and in "violation of the rights secured to the Naviga"tion Company, which were considered as par"amount to the subsequent law authorising the "city to impose the toll upon vessels."

ON the 21st of July last, the ordinance complained of was passed.

THE Council in the preamble begin by referring to the act of the Legislature for building the bridge and the decree of the Superior Court inhibiting the collection of the toll. They next state their right of "laying taxes and set forth "that there had existed formerly a dormant "bridge on the bayou so that the portcullis was "constructed only for the advantage of naviga"tion, and consequently it is most equitable to "subject to the payment of a retribution all boats "&c. for whose passage it is necessary to open

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"the portcullis, for which purpose a person is "paid constantly to attend the same: whereas "the salary of the person employed to attend "the bridge, also the expences of the repairs of "the said bridge and portcullis are to be defrayed "by the corporation."

AFTER this preamble the Council proceed to decree that "for every boat, barge, schooner or "other vessel for whose passage it shall be ne- "cessary to open the portcullis on the bayou St. "John, shall be received a toll of two dollars."

ON these facts the complainants contend tha the act of incorporation, does not authorise the laying of this toll.

2. THAT this ordinance violates the constitution of the United States, which forbids the imposition of tonnage duty without the consent of congress.

3. THAT it is contrary to the charter of the Navigation Company.

4. THAT it is an infraction of the decree of the Superior Court which prohibits the collection of the dollar tax.

I. IN support of the first proposition, that the act of incorporation does not authorise the laying of this toll or tax, it is said, that it is in vain sought to be justified by the 6th section of the act of incorporation which the ordinance sets forth in the preamble in these words—"The Mayor and "City Council are authorised to levy taxes in "the manner that they may deem expedient, on

"real and personal property *situated within the "limits of the city*," for the boats on which the toll is attempted to be levied are not property *situated within the limits of New-Orleans*. The situation which authorises a toll, must be a *situation with some degree of permanence*. It is true the word *situated* is not to be found in the English part of the act of incorporation, but it is implied. The translator of the act understood it so: the City Council understood it so, in the French and English copies of their own ordinance which they have published. Nay the territorial legislature understood it so, for otherwise it would have been in vain to have authorised the City Council to receive the dollar tax laid by the Cabildo. For the City Council required no sanction but that of their ordinance, if the word *situated* be not necessarily implied.

On this point I incline to admit the objection made by the complainants. For if it be not valid, the corporation may extend their power of taxation to negroes residing on distant plantations, or territories, occasionally coming to, or passing thro' the city, to the carriages, horses and baggage of travellers, to every pound of cotton coming down the river, to every ship and dollar's worth of goods entering it.

II. THE second objection is that the ordinance violates the constitution of the United States, which prohibits the imposition of tonnage duty, unless with the consent of congress.

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THE imposition, it is contended by the defendants, is not a tonnage duty; because the amount of it is not ascertained by the number of tons—but the complainants reply, that a tonnage duty is a duty on *shipping*—in the same manner as a poll tax is a tax on *persons*; that as a corporation inhibited by its charter to lay a poll tax, would violate it, if it laid a tax on the human body or any of its members; so a prohibition to lay tonnage duty must imply a prohibition to lay a duty on the number of square inches or feet in the hull of a vessel, or the length of her keel, or on the vessel herself.

III. THE third objection is, that the ordinance is contrary to the charter of the Navigation Company.

IT is said that as the legislature itself cannot violate this charter, it would be absurd to pretend that a corporation, which draws their existence from the legislature, may.

ON this point it seems to me that the act incorporating the Navigation Company being a private act, I cannot take in this suit any notice of it, and that the complainants, who derive no authority from that body, cannot invoke a charter which is private property.

IV. THE fourth objection is that the ordinance is an infraction of the decree of the Superior Court which forbids the collection of the dollar toll.

THE decree here alluded to was made in a suit, the parties of which were the Navigation Company and the present defendants. The present complainants were not parties in it—As to them it is *res inter alios acta.* It could not impair, it cannot better, their rights.

BUT the City Council contend,

1. THAT they have the power of laying taxes independently of their act of incorporation, that power being incident to all corporations.

2. THAT the toll is not a tax or duty but a fair retribution for services rendered.

3. THAT the application of the complainants is premature and improper.

I. THE first position does not appear to me supportable. It is true that corporations, the charters of which are silent as to the right of laying taxes, must have that right as incident to their incorporation; it rises *ex necessitate rei.*—The government of a city cannot be supported without money, any more than that of an empire, and as money cannot be raised without taxes, the authority to govern must necessarily draw with itself that of raising taxes.

BUT as the power of raising money is very liable to abuse, it is seldom granted without limitation and restraint, and this may be done *positively* by the exclusion of certain articles from taxation, or *negatively* by a specification of the objects of taxation—A specification which necessarily confining the power of the corporation

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to the detailed objects, must exclude it from all others.

THIS principle was recognized by Lord Macclesfield in the case of *Childs* vs. *the Hudson's Bay Company*. "A corporation has an implied "power to make bye-laws, they can only make "them in such cases as they are enabled to do "by the charter: for such a power given by the "charter implies a negative that they shall not "make bye-laws in any other case." 2 *P. W.* 209.

IN the city charter, power is given to lay taxes on property situated *within* the city. Such a power given by the charter, implies a negative that they shall not lay taxes in any other case—on property *without*.

II. IT is averred that the toll is not a tax nor a duty, but a fair retribution for services rendered.

IT is not on the score of taxation alone that a corporation may direct or require the payment of money—if there be services which must necessarily be performed by their officers, or by persons whose capacities must necessarily be ascertained before they are allowed to render them, the corporation may by law fix the amount of their retribution—as a fee to their clerk for furnishing records—or a pilot. If, therefore, the genuine character of this imposition be once ascertained, the question will be solved.

THE complainants urge that the real intention

of the Corporation is not the remuneration of the hands employed in raising the portcullis, but to fill the city coffers. In the preamble, the ordinance brings to view the necessity of procuring money, and the failure of the extraordinary fund which the Legislature had provided beyond the ordinary legitimate means of raising supplies—manifesting in the opinion of the counsel of the claimants, an intention indirectly to require the payment of the dollar toll, which the Superior Court has pronounced could not be demanded—transferring the place of exaction from the mouth of the bayou to the bridge, and as by this means the number of objects of taxation must be lessened, increasing the tax to four-fold. The complainants next draw my attention to the extravagance of the toll, considered on the score of a fair retribution—four dollars for passing and repassing. Hence they conclude that money is to be raised beyond the fair expence of raising and repairing the portcullis—even the whole cost of the whole bridge and its repairs. If this be the case, the court will be obliged to consider the toll as an imposition laid to fill the city coffers, on objects not within its reach, disguised under a call for a fair retribution of services rendered.

THE corporation endeavor to assimilate their right to the toll to that of the cabildo to the dollar tax, and consider their's as much stronger, as the money is demanded on the raising of the portcullis only—but the complainants reply, that in

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the deliberation of the Cabildo, the tax is justified on the ground that great expences had been incurred for the benefit of navigation, in digging the Canal Carondelet, which saved to the crafts the expence of carting their cargoes to the city, by enabling them to land and take them on the margin of the basin, near the hospital. "*Siendo este, (el canal* not *el puente) a beneficio de los que navigan sesde el bayou para Pensacola, Mobila & otros pareses, quienes ahorran quanto les coste los carruages, respecto que ahora llejan para cargar & descargar hasta las imediaciones del hospital de la carita.*" It is clear that in this deliberation, the portcullis of the bridge were considered as the toll gates of a turnpike road (the canal.) But now that the canal has become impassible, there is no similarity in the pretensions, nor could there be, since the power of deepening the canal is vested in another corporation.

III. LASTLY; the defendants complain by their counsel, that the application for relief in the present mode is improper or at least premature.

THE complainants might have waited till the toll was actually exacted, and then have brought their action for money had and received, to recover the toll, if it be illegal. To many, especially those who may not be resident of the neighborhood, this sort of remedy would have been worse than the disease. It would be more to their interest to submit to the imposition than to wait the tedious process of a suit which must

necessarily originate before a justice of the peace, with whose determination the party cast would not likely rest satisfied. If the injunction be granted, the question will much sooner be put at rest, and not only the present complainants, but a vast number of other persons will be relieved. The whole community has an interest in the solution of the point in dispute, and the mode of relief resorted to, appears to me the speediest, the easiest and the cheapest. Therefore

LET AN INJUNCTION ISSUE.

DORMENON'S CASE.

If a fact be discovered which would have prevented the admission of an attorney, he may be stricken off the roll.

By the Court, LEWIS, *J. alone.** IN the month of June, 1809, on the motion of *Derbigny* founded upon the affidavit of Mr. Guiet, the following rule was obtained against Pierre Dormenon.

"IT is ordered that Pierre Dormenon shew cause on the first Monday in August next, before the Superior Court, to be holden at the City Hall, at the city of New-Orleans, why his name as attorney and counsellor at law, should not be striken off the rolls of said court, for having (as it is alledged upon oath) headed, aided and assisted the negroes of St. Domingo, in their horrible massacres, and other outrages against the whites, in and about the year 1793."

* MARTIN, *J* declined giving an opinion, as the case had been argued before he came to this court.

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AT which day Mr. Dormenon appeared and denied the charge.

WHEREUPON a number of witnesses were called, and their examination taken in writing in open court; and the said Dormenon requesting time to procure exculpatory testimony, he was allowed until the first day of January following. Shortly after which day he appeared and submitted his proof and defence.

THE examination in support of the charge set forth in the rule was lengthy and is placed upon the files of this court. The witnesses appeared to be men of veracity—the credit of none has been impeached. It does not appear that either of them has had the least personal animosity towards Mr. Dormenon, or that they were actuated by motives of revenge or persecution, or felt any other sentiment than that which the recollection of their past sufferings, in the presence of the person whom they considered to have been a principal author of them, was calculated to inspire. And their testimony if true, fully substantiates the fact charged in the rule.

To repel the force of this testimony, Mr. Dormenon has produced testimonial proof (which is not denied) that in the various public employments in which the witnesses have known him, his conduct has been without reproach, and in his private life, exemplary and much esteemed; and as an additional evidence of his having en-

joyed public confidence, he has exhibited a list of appointments in the judiciary, made by Gen. Rochambeau, on which his name appears.

THIS may be all true, but, as it relates to an epoch some considerable time subsequent to the year 1793, does not contradict the witnesses, who speak of his conduct only in that year.

MR. Dormenon, in his defence in writing, has laboured totally to discredit the witnesses against him, by attempting to shew gross contradictions and absurdities in their testimony. If there be not a perfect coincidence in the witnesses in all the details of their testimony, they certainly agreed upon the important fact.

IT is proved that Mr. Dormenon was a municipal officer under the commissaries Polverell and Santhonax, in the year 1793, when the general freedom of the slaves was proclaimed. This Mr. Dormenon admits.

IT is proved also, that in that character, wearing a scarf, his badge of office, he marched at the head of the brigands, acting in concert with their leaders, whose sole purpose and employment was the indiscriminate murder and massacre of the whites who refused to conform to the orders of the commissaries; and that their conduct in various expeditions in pursuit of the whites, was marked with unexampled cruelty and barbarity. It is equally in testimony, that Dormenon associated and was the intimate friend of De Lisle, Brissot, Faubert and Gai, who

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headed the brigands in the quarter of Jacmel, Jeremy, and its dependencies.

THERE are many circumstances detailed by the witnesses which warrant a belief of these facts. In fact, they are as satisfactorily proven, as that Dormenon was a municipal officer, and can with as little plausibility be denied.

HAD the same evidence of these facts accompanied Mr. Dormenon's application for admission to the bar, I have no doubt he would have been refused.—The court now being possessed of it, it is equally their duty to exclude him. It is considered that the safety of the country requires that no person who has acted in concert with the negroes and mulattoes of St. Domingo, in destroying the whites, ought to hold any kind of office here, however fair their conduct may since have been.

AND from the evidence, no unprejudiced mind can doubt that such has been the conduct of Mr. Dormenon.

RULE MADE ABSOLUTE.

ANONYMOUS.

Whether a sale under an order of seizure is to be as under a *fi fa*?

LEWIS, *J.* The sale of mortgaged premises, under an order of seizure, must be executed in the same manner as sales, under writs of *fieri facias*, issued by clerks of court after judgment.

MARTIN, *J.* The acts of the Legislature of

this territory, 1805, 25, § 9, 1805, 46, 1808, 15, which point out the mode of selling property taken under the writ of *fieri facias*, make no allusion to the orders of seizure of mortgaged premises, any further than recognising the power of issuing them. It seems to me, therefore, that sales under the latter must be conducted in the same manner as they were before the passage of the act regulating sales under a *fieri facias*. A different construction would give rise to a serious inconvenience, and in some degree to a violation of the constitution of the United States. For as in sales on a *fieri facias*, if the property does not bring a certain proportion of the appraised value, it must be sold on a credit of twelve months, under a mortgage— it would follow, if on the order of seizure obtained on the mortgage, the property cannot be sold absolutely, the creditor would be legally compelled to take the property in discharge of the debt, at a certain proportion of the estimated value, or wait from year to year till somebody else should.

MITCHELL vs. *COMYNS*.

THE petition stated that the plaintiff was the owner of a negro girl, who left his plantation, in the state of Maryland, without his consent or knowledge, and came to the city of New-Orleans, where she lived with the defendant who

A sale in a notary's office is not a sale in market overt.

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was about to remove her to the province of West Florida. On the affidavit of one Hubbard, to these facts, a writ of sequestration issued, and she was thereupon apprehended.

AND, now *Hennen*, for the defendant, pleaded in abatement, the want of a power of attorney from the plaintiff or any authority from him for the institution of the suit.

By the Court. This is not pleadable in abatement: all that can be required, as the plaintiff appears to reside without the jurisdiction of this court, is that the person who prosecutes for him should give security for the costs of suit: but this is unnecessary since security has been given before the issuing of the writ of sequestration.

The answer did not deny the facts stated in the petition, but set up a claim to the girl grounded on a contract of sale duly entered into, before a notary public, in the city of New-Orleans, for a valuable consideration.

Hennen for the defendant. The purchase of the girl having been made from a person in open possession of her, the contract of sale being *bona fide* passed, in the office of a notary public, the defendant cannot be compelled by the judgment of this court to surrender the slave to her real, but till now latent, master, unless the latter refunds the purchase money. *Civil Code*, 488 *art.* 76.

THE office of a notary must be considered as a market overt, and it is in evidence that the vendor was a dealer in negroes. These two circumstances clearly bring the present case within the provisions of the Code.

ALTHOUGH by a statute of this territory, slaves are things, and conveyed as real property, yet in some cases they are considered as personal property: for larceny may be committed of a slave. If we therefore consider a slave as personal property, it will follow that his owner must be precluded from a recovery against a person to whom a *bona fide* transfer has been made, for a valuable consideration, although the transferor may have unfairly obtained possession of the slave.

Prevost for the plaintiff. Although the office of a notary public be a public office, and its acts generally of great public notoriety, yet it is not a place in which it may be expected, horses, cattle and negroes are usually brought for sale, as in a fair or market.

By the Court. The Code provides that if the thing stolen has been purchased at a public market, or a fair, or at a public auction, the former owner shall not recover it without reimbursing the sum paid by the purchaser. We do not know that it would suffice that a bill of sale should be executed in a market or a fair. The chattel purchased ought to be brought and the contract made there. Markets and fairs are places to which

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wares are brought and exposed for sale, where notice may be taken of the disposal of them—where the owner of lost or stolen property may look for and be apprised of the presence of it. It is otherwise of the office of a Notary Public. It is not a place in which bargains are made: altho' after the parties have agreed, they may resort thither to have the evidence of their respective rights and obligations recorded and perpetuated. The thing which is the object of the contract is very seldom brought thither, so that the redaction and execution of an instrument by a Notary Public does not expose a fraudulent vendor to detection in the same manner as the production of the thing at a market or fair for sale. The case is neither within the words nor the spirit of the Code.

Judgment for Plaintiff.